RECORD AND BRIEF

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Nos. 16-285, 16-300 & 16-307

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION, *Petitioner*,
v.
JACOB LEWIS, *Respondent*.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,
v.
MURPHY OIL USA, INC., *et al.*, *Respondents*.

ERNST & YOUNG LLP, *et al.*, *Petitioners*,
v.
STEPHEN MORRIS, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF TEN INTERNATIONAL LABOR UNIONS, NATIONAL EMPLOYMENT LAW PROJECT, AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS IN NOS. 16-285 & 16-300 AND PETITIONER IN NO. 16-307

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STATEMENT OF INTEREST

Amici American Federation of Teachers; American Federation of State, County and Municipal Employees; Communications Workers of America; International Association of Machinists; International Brotherhood of Teamsters; International Union, United Automobile, Aerospace and Agricultural Implement Workers of America; National Education Association; Service Employees International Union; United Food and Commercial Workers International Union; and United Steelworkers International Union are international labor unions with a combined membership of approximately 13.5 million working men and women throughout the United States and Canada.

Amicus National Employment Lawyers Association is a non-profit professional membership organization, with 69 affiliates throughout the country, composed of attorneys who represent workers in labor, employment, and civil rights disputes. Amicus National Employment Law Project is a New York-based nationwide nonprofit organization that partners with community-based worker centers and other low-wage worker representatives in all 50 states to advocate for the rights of unorganized workers.

Each of the undersigned amici is dedicated to promoting the rights of working people, with the goal of advancing and safeguarding the full employment, economic security, and social welfare of workers and their families.[1]

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[1] No counsel for a party authored this brief in whole or in part. No party, or its counsel, or any entity other than the

Amici and their counsel have considerable familiarity with "concerted activity" protections under federal and state labor law, from both a practical and historical perspective, and have extensive experience with the history of labor and employment arbitration in the American workplace. Amici and their members also have a strong interest in preserving the core workplace protections established by Congress in the National Labor Relations Act, 29 U.S.C. §§151 et seq. ("NLRA") and Norris-LaGuardia Act, 29 U.S.C. §§101 et seq., and recognize that if employers are allowed to impose contract terms that prohibit workers from challenging unlawful employer conduct except on an individual, one-on-one basis, Congress's statutory goals of minimizing industrial strife and maintaining labor peace will be set back more than a century.

INTRODUCTION AND SUMMARY OF ARGUMENT

The threshold issue in these consolidated cases is whether federal labor law, specifically, the NLRA and Norris-LaGuardia, make it unlawful for an employer to prohibit its employees from filing legal claims on a joint, class, collective or other group action basis to seek a peaceful, impartial resolution of a legal dispute arising from commonly held workplace rights.

The arbitration contracts in these cases prohibit *every* potential form of non-individual, group legal

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undersigned amici and their counsel have made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed general letters with the Clerk's office consenting to the filing of amicus briefs. *See* Rules 37.6, 37.3(a).

action, not just Rule 23(b)(3) damages class actions. Although the Employers and their amici repeatedly refer to their prohibitions as "class action waivers," their contracts prohibit all manner and form of joint or group legal challenges, whether brought by two or more workers, by a single worker soliciting the joinder of others, or otherwise. Epic Systems' contract goes even further, depriving arbitrators of authority to award any form of non-individual relief, such as an injunction against unlawful company-wide practices. *See* Epic Pet. 31a-32a.

If the Employers had imposed these prohibitions in any manner other than through an arbitration agreement—*e.g.*, an individual employment contract, a hiring term letter, or a posted workplace policy—those prohibitions would be unlawful under the NLRA and unenforceable under Norris-LaGuardia because they would deprive workers of their core statutory right to be free from employer interference, restraint, and coercion when engaged in concerted activity for mutual aid or protection. *See, e.g.*, *National Licorice Co. v. NLRB*, 309 U.S. 350, 360-61 (1940); *Convergys Corp.*, 363 NLRB No. 51 (2015), *enf. denied by divided panel*, __ F.3d __, 2017 WL 3381432 (5th Cir. Aug. 7, 2017). The Employers nonetheless contend that because they chose to embed their prohibitions against concerted legal action in pre-dispute arbitration contracts, the Federal Arbitration Act of 1925 ("FAA"), 9 U.S.C. §§1 et seq., trumps the later-enacted Norris-LaGuardia and the NLRA and requires the enforcement of those prospective prohibitions.

That cannot be. Whatever principles may apply in the consumer context, Congress recognized that em-

ployment is different when it enacted Norris-LaGuardia in 1932 and the NLRA in 1935. Because of the economic and psychological importance of having and keeping a job and the enormous disparity in economic power between individual workers and their employers, Congress established as the foundational, non-waivable cornerstone of national labor policy the right of employees to act in concert for mutual aid or protection.

The enforceability of an illegal employment contract term under the NLRA and Norris-LaGuardia cannot turn on whether it is inserted into an arbitration contract rather than some other employment agreement. If illegal restrictions on concerted activity could be immunized by the simple expedient of embedding them in an arbitration contract, employers could immunize prospective waivers of their employees' statutory right to picket, strike, or boycott simply by requiring arbitration of all workplace disputes, on an individual basis, while forbidding all traditional forms of group protest. Nothing in federal labor law permits that distinction. Employers should have no greater authority to compel their workers to waive the right to pursue group legal action challenging unlawful workplace conditions than to compel waiver of the right to picket, strike, or boycott over those same conditions. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 835 (1984) ("There is no indication that Congress intended to limit this [concerted activity] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way."); *Salt River Valley Water Users Ass'n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953), *enf'g* 99 NLRB 849, 853 (1952) (employee's circulation of peti-

tion to obtain authorization to pursue FLSA claims constitutes protected concerted activity).

Nothing in the language or legislative history of the FAA requires a different result. The Employers and their amici, in asserting that an employer's prohibition of all non-individual workplace claims filing becomes lawful if inserted in a pre-dispute employment arbitration contract, principally rely on a construction of FAA §2 that they attribute to *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012). But this Court has never required enforcement of an otherwise unenforceable contractual waiver of statutory rights simply because it was inserted in a mandatory pre-dispute employment arbitration agreement rather than a separate contract, and FAA §2 makes plain that the same rules of statutory construction must apply regardless of what type of contract incorporates the allegedly unlawful provision.

Countless examples could be provided of facially unlawful clauses in arbitration agreements that courts would not hesitate to invalidate, where the underlying statute does *not* expressly refer to the FAA or to arbitration as the Employers' test would require. E&Y Br. 22-24. For example, Title VII would surely preclude enforcement of a clause that required gender discrimination claims to be heard by male decisionmakers or that limited the number of depositions available to Hispanic employees. The Age Discrimination in Employment Act would similarly prohibit a clause limiting backpay remedies for workers over age 60. Yet under the Employers' construction of the FAA and *CompuCredit*, judicial enforcement of those discriminatory provisions would

be required because Title VII, the ADEA, and most other worker-protection statutes do not expressly refer to "arbitration" or the "FAA."

Statutes must be construed in light of their historical context and as the enacting Congress intended. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) (the ordinary and common meaning of statutory language is the meaning of those terms "at the time Congress enacted the statute"); *MCI Telecommunications v. Amer. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) ("the most relevant time for determining a statutory term's meaning" is when the statute "became law"). Congress's contemporaneous understanding of the interplay among the FAA, Norris-LaGuardia, and NLRA must be informed not only by the language of all three statutes (including Section 15 of Norris-LaGuardia, 29 U.S.C. §115, which states that the Act supersedes any statutory provision that conflicts with the national labor policy it establishes) but also by the narrow reach of Congress's Commerce Clause authority when it enacted the FAA in 1925, *see infra* at 32-33, and by Congress's recognition, before and after enactment of the FAA, that workplace-wide arbitration was a common and effective mechanism for resolving labor disputes and achieving industrial peace, *see infra* at 28-30.

Amici, who write on behalf of tens of millions of American workers and their representatives, urge this Court to conclude that the Board and the Seventh and Ninth Circuits (and, most recently, the Sixth Circuit in *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393 (6th Cir. 2017)), were correct in holding that a workplace policy that strips employees of their

right to pursue legal challenges to workplace conditions in concert—i.e., on any joint or other group basis that the workers would otherwise be permitted to pursue—is void and unenforceable under federal labor law, whether set forth in an individual employment arbitration agreement or in any other employment contract. That result is required by the plain language of the FAA, NLRA, and Norris-LaGuardia, the contemporaneous intent of Congress, and the long and rich history of "concerted activity" and workplace arbitration in the United States. *See also Convergys Corp.*, 2017 WL 3381432 at *6-*11 (Higginbotham, J., dissenting).

ARGUMENT

I. The Right of Employees to Engage in Concerted Activity for the Purpose of Mutual Aid or Protection is the Core Substantive Right Protected by Federal Labor Law

For the past 85 years, federal labor law has prohibited employers from enforcing individual employment contract terms that prohibit employees from peacefully acting in concert to vindicate workplace rights. The right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection" has long been the core substantive right protected by Norris-LaGuardia and the NLRA, and the Board and the federal appellate courts have consistently held that it encompasses concerted efforts to seek adjudication of claims challenging the legality of an employer's workplace policies and practices. *See* NLRB Br. at 11-21; Lewis Br. 10-17. Without the ability to

act in concert, only the most specialized and sought-after workers would be able to bargain over the terms and conditions of their employment or advocate for greater workplace rights.

In amici's experience, confirmed by decades of case law, few workers are willing to put a target on their back by bringing legal claims against their employer on an individual basis, given the threat of workplace retaliation, blackballing, and other, "more subtle forms" of employer disapproval, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978); and that is true even among the small proportion of workers who might otherwise have the financial means and legal knowledge required to pursue such claims.[2]

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[2] *See Crawford v. Metro. Gov't*, 555 U.S. 271, 279 (2009) (chilling effect of potential retaliation "is no imaginary horrible given the documented indications that '[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias or discrimination' ") (quoting Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20, 38 & n.58 (2005)); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) ("broad protection from retaliation helps ensure the cooperation upon which accomplishment of [Title VII's] primary objective depends"); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions"); *D.R. Horton*, 2012 WL 36274, at *3 n.5; David Weill & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Policy J. 59, 83 (Fall 2005) (citing studies showing that "being fired is widely perceived to be a consequence of exercising certain workplace rights"); Cynthia Estlund, *Free Speech and Due Process in the Workplace*, 71 Indiana L.J. 101, 120-23 (1995) (fear of employer retaliation is key reason for workers not reporting

A. Congress Enacted Norris-LaGuardia and the NLRA to Reduce Industrial Strife Resulting from Court Injunctions that Enforced One-Sided Employment Contracts Imposed on Individual Workers

Congress first codified the right to engage in "concerted activities for the purpose of . . . mutual aid or protection" as the fundamental principle of national labor policy in 1932 in Norris-LaGuardia, where it declared as "the public policy of the United States" that individual employees have the right to be "free from the interference, restraint, or coercion of employers" in the "designation of . . . representatives or in self-organization or *in other concerted activities for the purpose of* collective bargaining or *other mutual aid or protection*." 29 U.S.C. §102 (emphasis added). In sweeping language (enacted seven years *after* the FAA) Congress then flatly declared:

> *Any* undertaking or promise . . . in conflict with [that policy is] contrary to the public policy of the United States [and] *shall not be enforceable in any court of the United States* . . . .

Id. §103 (emphasis added). Congress's withdrawal of the federal courts' authority to enforce contracts

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wrongdoing); Milliken, Morrison & Hewlin, *An Exploratory Study of Employee Silence: Issues that Employees Don't Communicate Upward and Why*, NYU School of Business (Nov. 4, 2003), *available at* http://w4.stern.nyu.edu/emplibrary/Milliken.Frances.pdf (discussing study on employee fear of retaliation or punishment, and employee fear of being labeled or viewed negatively by employer, as reasons for employees not acting on concerns about company policies or decisions).

that stripped workers of the right to act in concert for mutual aid or protection was a core provision of Norris-LaGuardia; and that Act's broad statement of national policy and purpose was crucial to the Board's statutory analysis in *D.R. Horton*, 357 NLRB 2277, 2012 WL 36274, at *7-*8 (2012), and subsequent decisions. *See, e.g., On Assignment Staffing Servs., Inc.* 362 NLRB No. 189, 2015 WL 5113231, at *10 (2015) (describing purpose and scope of Norris-LaGuardia's protections). Yet the Employers and their amici ignore Norris-LaGuardia almost entirely.

Congress enacted Norris-LaGuardia to strengthen the concerted-activity protections it had enacted in Sections 6 and 20 of the Clayton Act of 1914, 15 U.S.C. §17; 29 U.S.C. §52, which had proven inadequate to protect workers from having their collective protests and bargaining efforts enjoined as unlawful labor conspiracies by state and federal courts. *See City Disposal Systems*, 465 U.S. at 835; *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 715-16 (1982); Felix Frankfurter & Nathan Greene, The Labor Injunction 7-10, 49-50 & n.7, 136-50, 165-76 (MacMillan 1930) ("Frankfurter"); William E. Forbath, Law and the Shaping of the American Labor Movement 115-16 & n.65, 147-63 (Harvard Univ. Press 1989) ("Forbath"); *see also* N.E. Legal Found. Amicus Br. at 20-21 & n.10. As these authorities and contemporaneous accounts demonstrate, Congress in Norris-LaGuardia sought to create a federally guaranteed right to engage in concerted activity that would prevent future judicial enforcement of one-sided employer-mandated contracts that prohibited employees from joining independent unions, jointly pursuing workplace griev-

ances, or engaging in other concerted actions to improve workplace conditions.

Congress's purpose was not just to protect the right of workers to organize and collectively bargain, although those were important objectives. More broadly, based on its recognition that individual workers cannot meaningfully negotiate over employer-mandated contract terms and that judicial enforcement of rights-stripping contracts was causing disruptive social discord, Congress sought to strengthen the ability of American workers—non-union and union alike—to act collectively to improve their workplace conditions through non-violent means. *See* 29 U.S.C §102; Frankfurter at 204-05, 210-12; Forbath at 59-97; Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris La-Guardia Act*, 93 Neb. L. Rev. 6, 10-12, 16 (2014). As Norris-LaGuardia's co-sponsor Senator George Norris explained, Norris-LaGuardia was necessary to end a regime in which "the laboring man must accept unconditionally the terms laid down by the employer" and must "singly present any grievance he has . . . [with] no opportunity to join with his fellows and make his demands effective." 75 Cong. Rec. 4504 (1932) (remarks of Sen. Norris); *see also Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 n.14 (1978) (Norris-LaGuardia "expresses Congress' recognition of the 'right of wage earners to organize and to act jointly in questions affecting wages, conditions of labor, *and the welfare of labor generally*' ") (quoting S. Rep. No. 72-163 (1932)) (emphasis in *Eastex*).

Just three years after enacting Norris-LaGuardia, Congress reiterated those central principles of fed-

eral labor policy in the NLRA, which created the National Labor Relations Board and authorized it to enforce that same right to engage in concerted activity for mutual aid or protection against employer interference, restraint, or coercion. Section 7 of the NLRA mirrored Section 2 of Norris-LaGuardia by again guaranteeing employees the "right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. §157. The NLRA also established an administrative mechanism for enforcing that right, providing that "[i]t shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." *Id.* §158(a)(1); *see also id.* §151 (declaration of policy); *Murphy Oil* Pet. 2, 10, 16 (describing statutory basis and history of right to engage in concerted activity).

Like Norris-LaGuardia, the NLRA was enacted to counter the disparity in power that left individual employees unable to meaningfully improve the terms and conditions of their employment, *see Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753-54 (1985), a disparity that Congress had also recognized in prior statutory enactments, *including* the FAA. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 n.9 (1967) ("We note that categories of contracts otherwise within the [Federal] Arbitration Act but in which one of the parties characteristically has little bargaining power are expressly excluded from the reach of the Act. See §1."). The legislative history of the FAA reflects that recognition. As explained by Senator Walsh, for example, in comparing insurance and employment contracts to the types of

commercial contracts that were the focus of the FAA's drafters:

> The trouble about the matter is that a great many of these contracts that are entered into are really not voluntar[y] things at all. . . . It is the same with a good many contracts of employment. A man says, 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong., 4th Sess. 9 (1923).

B. Congress Did Not Create Two Separate Tiers of Concerted Activity Protection in Either Norris-LaGuardia or the NLRA

The Employers and some of their amici now suggest (for the first time) that Congress intended to create two tiers of concerted activity in its 1930's legislation: a core protection for union organizing and collective bargaining, and a lesser protection (or according to some, no protection at all) for all other concerted activity for mutual aid or protection. That construction is not supported by the language or purpose of Norris-LaGuardia (which broadly prohibits the enforcement of *any* undertaking or promise that conflicts with employees' right to pursue concerted activities for the purpose of mutual aid or protection, 29 U.S.C. §103), or the NLRA (which, like Norris-La-

Guardia, expressly expanded upon the concerted-action protections of prior statutes, including the Railway Labor Act of 1926, *see* Hobson Br. 20-21, 26). Nor is the Employers' construction supported by *ejusdem generis*, a canon whose malleability is highlighted by the Employers' and their amici's inability to agree even among themselves as to what the activities described in Section 7 have in common.[3]

The reason Congress guaranteed the broad right to engage in "other concerted activities for the purpose of . . . other mutual aid or protection" was not because it believed that "other" concerted activities were less important than collective bargaining or union organizing. Almost all concerted workplace activity has the potential to increase workers' collective power and cohesiveness going forward—even in organized workplaces that already have bargaining agreements in place. *See, e.g., NLRB v. Gould, Inc.*, 638 F.2d 159 (10th Cir. 1980) (sympathy strike supporting unorganized workers); *NLRB v. Difco Lab., Inc.*, 427 F.2d 170 (6th Cir. 1970) (sympathy strike supporting different union); *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942) (L. Hand, J.) (published statement of support for farmers' cooperative).

Nor could Congress reasonably have concluded that its goal of reducing industrial strife would be

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[3] *Compare* U.S. Amicus Br. 27 ("substantive workplace-related rights closely akin to self-organization or collective bargaining") *with* Epic Br. 34 ("things that employees can engage in either on their own or with the involvement of no one other than their employers") *and* E&Y Br. 17 ("concerted activities such as the enumerated activities").

more directly or effectively furthered by union organizing and collective bargaining than by other forms of concerted activity. When an employer engages in wrongful discrimination or violates other workplace statutory obligations, it is far less disruptive to allow the injured workers to pursue concerted legal action before a neutral decisionmaker than to force the workers to challenge that unlawful conduct through less effective and potentially more contentious form of group protest, such as strikes, that pit workers and employers directly against each other without the intermediary of a neutral pledged to apply the law fairly and impartially.

Rather, Congress had two reasons for referring generally to "other" concerted activities in 1932 and 1935: first, to ensure that "mutual aid or protection" would encompass indirect no less than direct efforts to obtain workplace improvements, *see* Frankfurter at 26-27 ("When the objectives of concerted action are higher wages, shorter hours and improved working conditions, . . . the benefit to workers is direct and obvious, and the right to combine for such purposes is universally recognized."); and second, because Congress knew it could not anticipate the many ways in which workers seeking to improve their economic circumstances might join in common endeavor to advocate for workplace improvements. *See NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board."); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500-01 (1978). As the Board has held: "The language of Section 7 is general and broad; there is no indication in the statutory text, in the legislative history, or in the Supreme Court's

decisions that the 1935 Congress intended to fix, for all time, the ways in which employees would be able to engage in protected efforts to improve their working conditions." *Murphy Oil*, 361 NLRB No. 72, 2014 WL 5465454 at *19 (2014); *see also* S. Rep. No. 74-573 (1935) ("It is impossible to catalog all the practices that might constitute interference, which may rest upon subtle but conscious economic pressure exerted by virtue of the employment relationship.").

Moreover, by joining together and sharing the burdens of concerted adjudication, workers pursuing joint legal claims are acting in a manner that Congress *expressly* protected in Section 4 of Norris-LaGuardia. 29 U.S.C. §104(d). That provision guarantees employees the right "[b]y all lawful means [to] aid . . . any person participating or interested in any labor dispute who . . . is prosecuting, any action or suit in any court of the United States or of any State." *Id.* Section 4 also protects "[g]iving publicity to the existence of, or the facts involved in, any labor dispute . . . by any . . . method not involving fraud or violence"—which encompasses soliciting joinders, sending notice, and otherwise banding together for the purpose of pursuing legal claims against an employer. 29 U.S.C. §104(e).

No court or administrative body in the past 85 years has demoted "other" concerted activity to lesser status, as the Employers urge. Nor would that construction make sense, as Congress's goal was not to further union organizing or collective bargaining for their own sake, but as instruments to further the broader statutory goal of reducing industrial strife and achieving economic stability by empowering workers to join together to improve the terms and

conditions of employment. *See, e.g., Brooks v. NLRB*, 348 U.S. 96, 103 (1954) ("The underlying purpose of this statute is industrial peace."); *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785 (1996); *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 237 (1938). Indeed, Senator Wagner introduced the bill by explaining that it was intended to address the "sharp outbreaks of economic warfare in various parts of the country . . . ," 78 Cong. Rec. 4229, 4230 (1934), and the Senate Report reiterates that "[t]he first objective of the bill is to promote industrial peace." S. Rep. No. 573, 74th Cong., 1st Sess. 1 (1935).

Consistent with these legislative objectives, dozens of federal appellate decisions, from the late 1930s to the present, have held that Section 7 protects a broad range of joint worker efforts, including many forms of concerted activity that bear only an indirect relationship to union organizing or collective bargaining.[4]

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[4] *See, e.g., Houston Insulation Contractors Assoc. v. NLRB*, 386 U.S. 664, 668-69 (1967) (refusal to work); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 223-24 (1963) (striking in support of bargaining demands); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 13-14 (1962) (walking out of work); *NLRB v. Coca Cola Bottling Co.*, 811 F.2d 82 (2d Cir. 1987) (testifying on behalf of fellow employee in criminal trial concerning alleged strike misconduct); *Socony Mobil Oil Co. v. NLRB*, 357 F.2d 662 (2d Cir. 1966) (writing letter to government agency concerning employer's failure to comply with safety statute); *Wulls Mfg. Co. v. NLRB*, 321 F.2d 753 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 923 (1963) (writing letters to state health department complaining of unsanitary conditions in factory); *NLRB v. Guernsey-Muskingum Elec. Co-op, Inc.*, 285 F.2d 8 (6th Cir. 1960) (concerted complaints to management concerning ap-

C. The Employees in these Cases Were Engaged in Concerted Activity for Mutual Aid or Protection

In each of these three cases, the workers whose rights are at issue were engaged in concerted activity for mutual aid or protection. In *Murphy Oil*, four workers joined to file a multi-claimant action for unpaid wages and benefits. In *E&Y* and *Epic*, the original plaintiffs joined their claims with others and reached out to co-workers with identical wage claims, who then retained the same counsel and filed consent-to-sue joinders under 29 U.S.C. §216(b), thereby becoming co-plaintiffs. In all three cases, those workers stated their intent to seek class and/or collective action certification, thereby promising to "fairly and adequately protect the interests of the class" if certification were granted, *see* Fed. R. Civ. Pro. 23(a)(4), and asking for permission to send written notice to all similarly situated co-workers

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pointment of allegedly unqualified foreperson); *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 988 (7th Cir. 1948) (letter to management about filling open position that would impact letter-writers' work, "even though no union activity be involved or collective bargaining be contemplated."); *Peter Cailler Kohler*, 130 F.2d 503 (resolution supporting farmers' cooperative in dispute with employer's customer); *Bethlehem Shipbuilding Corp. Ltd. v. NLRB*, 114 F.2d 930, 937 (1st Cir. 1940), *cert. dismissed*, 312 U.S. 710 (1941) (employees' public support for state workers compensation bill protected under Section 7, which "is not limited to direct collective bargaining with the employer, but extends to other activities for 'mutual aid or protection,' including appearance of employee representatives before legislative committees"); *see also D.R. Horton*, 2012 WL 36274, at *2-*3 (citing cases).

under Rule 23(c)(2)(B) and *Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989), to inform co-workers of their statutory rights and their opportunity to participate in the group effort to remedy their employers' allegedly unlawful workplace practices. The workers also acted precisely as Congress authorized them to act, not only in Norris-LaGuardia and the NLRA, but also in the FLSA, which since 1938 has expressly allowed covered claims to "be maintained . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated," 29 U.S.C. §216(b), thus further recognizing the protections given to concerted actions in the workplace.[5]

By joining together in filing their legal claims, and by taking steps to encourage others to join as well, plaintiffs sought to spread the risks and burdens of litigation, gain strength and protection in numbers, and share information and resources, thereby reducing the risk of retaliation and increasing the likelihood of a favorable resolution of their workplace disputes, all of which is activity for the purpose of mutual aid or protection. *See Meyers Industries, Inc.*, 281 NLRB 882 (1986), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988) ("definition of concerted activity . . . encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action"); *Int'l Transp. Serv. Inc.*

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[5] This same statutory provision is incorporated into the Age Discrimination in Employment Act, 29 U.S.C. §626(b); the Equal Pay Act, 29 U.S.C. §216(b); and the Family Medical Leave Act, 29 U.S.C. §2617(a)(2).

v. NLRB, 449 F.3d 160, 166 (D.C. Cir. 2006) ("[C]oncerted activity includes circumstances where individual employees work to initiate, induce or prepare for group action.") (quotation marks and citation omitted).

E&Y contends that Rule 23(b)(3) class actions are not *necessarily* concerted, because a class action potentially could be filed by a single plaintiff who has never communicated with any co-worker and who (despite the requirements of Rule 11) has no intention of seeking class certification. No one contends that this happened in any of these cases. Nor have the Employers cited a single court or Board decision in which an individual who filed or joined a class action was held *not* to be engaged in concerted activity for the mutual aid or protection of similarly situated co-workers.

Proceeding on a group action basis is the most efficient, least costly, and least retaliation-risking mechanism available for challenging the legality and enforceability of employer policies and practices that affect groups of similarly situated workers. In amici's experience, the collective benefits achievable through such concerted legal actions are precisely why workplace claims challenging the common application of such policies and practices are so often pursued as joint and class actions in the first place.

While several Employer-side amici cite decade-old surveys and reports for the dubious proposition that workers *benefit* from and *prefer* arbitration to litigation (an assertion that is not only counterfactual but contrary to common sense, because if arbitration were as good for workers as those amici insist, no

employer would need to impose mandatory pre-dispute arbitration as a condition of employment), the reality is that even before employers began including express class action "waivers" in their mandatory employment agreements, *see* Business Roundtable Br. 2-3 (describing such prohibitions as "de rigeur" since at least 2010), the number of workers filing workplace claims in arbitration dropped substantially while the amount of those workers' recoveries has remained comparatively low.[6]

None of the Employers or their amici identify any benefit to workers from being denied the right to choose whether to pursue workplace claims collectively or individually. Nor could they, because if employers are given the right to prohibit all forms of legal challenge other than individual arbitration, many workers, particularly non-unionized low-wage workers, would have no ability to protect—or in

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[6] *See, e.g.*, Cynthia Estlund, "The Black Hole of Mandatory Arbitration," 96 N.C. L. Rev. __ (forthcoming 2018) (citing recent empirical studies and analyzing structural causes); Judith Resnick, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L.J. 2804, 2813-14 (2015) ("Resnick"); J. Maria Glover, *Arbitration, Transparency, and Privatization: Disappearing Claims and the Erosion of Substantive Law*, 124 Yale L.J. 3052 (2015) ("Glover"); Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 Brooklyn L. Rev. 1309 (2015); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berk. J. Emp. & Lab. L. 71 (2014); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. Empirical Legal Studies 1, 6 (2011).

many cases, even to obtain notice of—their workplace rights, leaving employers effectively immune from legal challenge—which is the obvious reason why employers insert clauses into their arbitration contracts that strip workers of their right to pursue legal claims in conjunction with co-workers. *See* Nicole Wredberg, *Subverting Workers' Rights: Class Action Waivers and the Arbitral Threat to the NLRA*, 67 Hastings L.J. 881 (2016); Resnick at 2879; Glover at 3066; Cynthia Eastlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. Pa. L. Rev. 379, 428-29 (2006).

D. The Employers' Contractual Bar on Concerted Legal Activity Violates Norris-LaGuardia and the NLRA

Section 8(a)(1) of the NLRA prohibits any effort by an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7," as does Section 2 of Norris-LaGuardia; and Section 3 of Norris-LaGuardia further prohibits judicial enforcement of "[a]ny undertaking or promise" that interferes with that right. For these reasons, "[i]t is a bedrock principle of federal labor law and policy that agreements in which individual employees purport to give up the statutory right to act concertedly for their mutual aid or protection are void," *Bristol Farms*, 363 NLRB No. 45, 2015 WL 7568339, at *3 & n.6 (2015), as many cases from this Court, the federal appellate courts, and the Board have held.[7]

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[7] *See, e.g.*, *J.I. Case v. NLRB*, 321 U.S. 332, 337, 341-42 (1944) ("Individual contracts no matter what the circumstances that

The Employers and their amici try to distinguish those cases factually. But their strained efforts must be rejected for the reasons set forth in the Board's and the party-Employees' briefs.

Under the NLRA and Norris-LaGuardia, an individual employment contract that requires a worker prospectively to forfeit the right to engage in protected concerted activity is invalid—whether it be an agreement not to join a union, not to join with co-workers in pursuing a legal challenge to the legality of their employer's workplace practices, or not to engage in any other concerted activities. The Board and the courts have so held countless times, in a wide range of circumstances, as required by the plain statutory language of the NLRA and Norris-LaGuardia.[8] For all

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justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act . . . ."); *National Licorice Co.*, 309 U.S. at 360-61 (affirming Board ruling that individual employment contract violates Section 8(a)(1) because it discouraged employees from presenting grievance to employer except on an individual basis: "contracts . . . stipulat[ing] . . . the renunciation by the employees of rights guaranteed by the [NLRA]" are "a continuing means of thwarting the policy of the Act."); *NLRB v. J.H. Stone & Sons*, 125 F.2d 752, 756 (7th Cir. 1942) (individual employment contract language requiring employees first to attempt to resolve employment disputes individually with employer is a per se violation of the Act because it was a "restraint upon collective action," even if "entered into without coercion"); *John & Ollier Engraving Co.*, 24 NLRB 893, 900-01, 906-07 (1940), *enf'd in relevant part*, 123 F.2d 589, 593 (9th Cir. 1941) ("profit-sharing" contract offered to employees that purported to waive right to strike violated Section 8(a)(1)).

[8] *See, e.g., Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988) (conditioning reinstatement on

of these reasons, the Court should conclude as a threshold matter that the NLRA and Norris-LaGuardia prohibit employers from interfering with their employees' statutory right to join together in seeking to vindicate workplace rights through concerted legal activity.

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waiver of Section 7 rights violates Section 8(a)(1)); *Pratt Towers, Inc.*, 338 NLRB 61, 64 (2002) (even where employer has right to deny re-employment, unlawful to condition reinstatement on waiver of Section 7 rights); *McKesson Drug Co.*, 337 NLRB 935, 938 (2002) (Section 8(a)(1) violated by employer conditioning return to employment on waiver of Section 7 rights); *Metro Networks, Inc.*, 336 NLRB 63, 66 (2001) ("[A]n employer may not coercively condition an individual's return to employment on . . . forbearance from future charges and concerted activity because future rights of employees as well as the rights of the public may not be traded away in this manner.") (quotation marks and citation omitted); *Carlisle Lumber Co.*, 2 NLRB 248, 266 (1936), *enf. as mod. on other grnds*, 94 F.2d 138 (1937), *cert. denied*, 304 U.S. 575 (1938); *Contractor Services, Inc.*, 324 NLRB 1254, 1254-55 (1997); *A&D Davenport Transp., Inc.*, 256 NLRB 463, 466-67 (1981); *Columbia Univ.*, 236 NLRB 793, 795-96 (1978); *John C. Mandel Security Bureau, Inc.*, 202 NLRB 117, 119 (1973); *Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 175-76 (2001); *see also Convergys*, 2017 WL 3381432 at *10 (Higginbotham, J., dissenting) ("[J]ust as an employer cannot require employees to waive their right to bargain collectively by characterizing bargaining as procedural, an employer cannot require employees to waive their right to class and collective actions."); *Murphy Oil*, 361 NLRB No. 72, 2014 WL 5465454, at *18 (2014) (a rule prohibiting concerted adjudicative activity "may be unlawful even if there is no showing that a covered employee ever engaged in the protected concerted activity prohibited by the rule, precisely because the rule itself discourages employees from doing so.").

II. There is No Conflict between the Federal Arbitration Act and the Federal Labor Law Right to Engage in Concerted Legal Activity

The ultimate question in these cases is whether the Employers' otherwise unenforceable prohibitions against group legal activity must be judicially enforced, solely because those prohibitions were set forth in mandatory pre-dispute arbitration agreements rather than in a stand-alone employment contract. The answer must be no, because employees have a substantive right to act in concert when initiating legal challenges to their employer's workplace policies,[9] and because the FAA's savings clause, 9 U.S.C. §2, makes arbitration agreements "as enforceable as other contracts, but not more so." *Prima Paint*, 388 U.S. at 404 n.12; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006). After all, the FAA is merely a procedural statute, enacted to establish a mechanism for judicial enforcement of "provision[s] in a written contract to settle [covered disputes] by arbitration," 9 U.S.C. §2, and was intended neither to create substantive rights nor to deprive the parties to an arbitration contract of existing statutory rights.[10]

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[9] *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995) (distinguishing between explicit statutory guarantees, which are substantive, and the mechanisms for enforcing them, which are procedural).

[10] As this Court held in *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924) (Brandeis, J.), in upholding the constitutionality of the New York Arbitration Act of 1920 (which was the model for the FAA, *see Hall St. Assocs., L.L. C. v. Mattel, Inc.*, 552 U.S. 576, 589 n.7 (2008)), the New York law

A. Giving Effect to Norris-LaGuardia and the NLRA Would Not Interfere with any Fundamental Attributes of Arbitration

The Employers argue that under *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), an otherwise unlawful term in an arbitration contract must be enforced if striking it would interfere with a "fundamental attribute" of arbitration, such as speed, efficiency, low cost, or informality. That argument fails for the reasons explained by the Board and the Party-Employees, and because: (1) Supremacy Clause

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simply established a procedure for enforcing voluntary arbitration contracts and was not intended to affect any substantive legal rights or remedies. 264 U.S. at 124 ("This state statute is wholly unlike those which have recently been held invalid by this court. The Arbitration Law deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt either to modify the substantive maritime law or to deal with the remedy in courts of admiralty.").

In the FAA's legislative history, Congress cited *Red Cross Line* in explaining the similarly limited intended scope of the FAA, *see* S. Rep. No. 68-536, at 3 (1924), and also cited (as setting forth the "principles" that Section 2 "follows") "the leading case of *Matter of Berkovitz* (230 N.Y. 261)." *See Hearing on S. 4213 and S. 4212 Before a Subcommittee of the Committee on the Judiciary United States Senate*, 67th Cong., 4th Sess., at 2, 18-22 (1923); *Joint Hearings on S. 1005 and H.R. 646 Before the Subcommittees of the Committees on the Judiciary Congress of the United States*, 68th Cong., 1st Sess., at 33-41 (1924). In *Matter of Berkovitz*, the Court of Appeals of New York emphasized that "[a]rbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow." 230 N.Y. at 270 (Cardozo, J.) (quoted in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 286-87 (1995).

analysis does not apply where the conflict is between two sets of federal statutes rather than a federal statute and state law; and (2) in the context of workplace disputes, multi-claimant arbitration has always been the rule rather than the exception, since well before the enactment of the FAA.

1. *Concepcion* involved state law "obstacle" preemption under *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), not a potential conflict between two sets of federal statutes. While inquiry into the fundamental attributes of arbitration might be appropriate under obstacle-preemption analysis (which asks whether, in the absence of an express conflict or express preemption, enforcement of state law would cause *any* interference with the broader goals and purposes of federal law), that inquiry has limited bearing on whether an irremediable conflict exists between two (or more) federal statutes.

When federal statutes potentially conflict, courts must attempt to reconcile them. In these cases, reconciliation can be accomplished by allowing employers to require arbitration of individual claims if they choose, as long as they provide an equivalent forum in which to pursue group legal claims (whether it be arbitration or litigation), thus giving effect to FAA §2 and the core, substantive nature of Section 7 rights. All FAA §2 requires is that arbitration contracts be treated no worse, or better, than any other contract.

2. By invalidating unlawful contractual prohibitions of group legal claims filing, the Board and the Sixth, Seventh and Ninth Circuits did not interfere with any fundamental attribute of *employment* arbitration. Joint, consolidated, and other multi-claim-

ant claims filings have long been common in labor and employment arbitrations, which historically involved disputes affecting entire workplaces and have *never* been limited to claims between a single individual and his employer.

When Congress enacted the FAA in 1925, labor arbitration was already an established mechanism for peacefully resolving workplace disputes affecting entire bargaining units, workplaces, and industries. Although Congress exempted workplace arbitration from the coverage of the FAA under Section 1 of that Act, 9 U.S.C. §1, it knew that labor arbitrators commonly adjudicated the rights of multiple workers in a single proceeding; indeed, Congress on several occasions itself required labor arbitration by statute. As this Court recognized in *Circuit City*:

> By the time the FAA was passed, Congress had already enacted federal legislation providing for the arbitration of disputes between seamen and their employers, see Shipping Commissioners Act of 1872, 17 Stat. 262. When the FAA was adopted, moreover, grievance procedures existed for railroad employees under federal law, see Transportation Act of 1920, §§300-316, 41 Stat. 456, and the passage of a more comprehensive statute providing for the mediation and arbitration of railroad labor disputes was imminent, see Railway Labor Act of 1926, 44 Stat. 577, 46 U.S.C. §651 (repealed).

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 (2001); *see also* D. Nolan, R. Abrams, *American Labor Arbitration: The Early Years*, 35 U. Fla. L. Rev. 373, 375 (1983) ("Nolan").

Five years before enacting the FAA, for example, Congress enacted the Transportation Act of 1920, Pub. L. 66-152, 41 Stat. 456 (1920). The Transportation Act provided that workplace disputes in the railroad industry may be referred to Boards of Labor Adjustment established by agreement of the parties, and if this Board were unable to resolve the dispute, to a standing Railroad Labor Board, *Id.* §§302-04, 307, before which the parties had the right to a hearing and to counsel. *Id.* §§309-10. The Railroad Labor Board heard almost 14,000 cases in its five-year existence, Nolan at 385-86, and was but one of several such industry-wide statutory dispute resolution mechanisms. *See* Railway Labor Act of 1926, ch. 347, 44 Stat. 577 (1926), as amended 45 U.S.C. §§151 et seq.; Newlands Act of 1913, ch. 6, §§1-8, 38 Stat. 103-08 (1913) (providing for arbitration of disputes concerning "wages, hours of labor, or conditions of employment . . . between an employer or employers and employees"); Arbitration Act of 1888, ch. 1063, 25 Stat. 501 (1888); Erdman Act of 1898, ch. 370, 30 Stat. 424 (1898).

During World War I, the nation experienced large-scale adjudication of labor disputes by the National War Labor Board ("NWLB"). The "result of voluntary agreement of leading representatives of the three great parties in interest—employers (capital), organized labor, and the public," the NWLB was established by Presidential proclamation. Richard B. Gregg, *The National War Labor Board*, 33 Harv. L. Rev. 39, 39-40 (1919). "The board was the court of last resort in all labor disputes for the entire country." *Id.* at 45. Although mediation and conciliation were the primary goals, "the pressure of circum-

stances was such that almost from the start the board acted in a number of cases as a court of arbitration." *Id.* at 44; Nolan, at 404-06 (discussing arbitration by NWLB).

As these examples demonstrate, multi-claimant arbitration affecting workplace-wide terms and conditions of employment was fully consistent with the fundamental attributes of *labor* arbitration as understood by Congress in 1925. That understanding has not changed over time, as shown by the labor arbitration cases decided by this Court that involved multiple workers (under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, the FAA, or both). *See, e.g., 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (age discrimination claims jointly brought by three employees); *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986) (grievance challenging layoff of 79 workers); *Nolde Bros. v. Bakery Workers*, 430 U.S. 243 (1977) (grievance seeking severance pay for all employees of closing bakery); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 575 (1960) (grievance filed by "[a] number of employees" challenging contracting out bargaining unit work); *United Steelworkers v. Enterprise Wheel Car Corp.*, 363 U.S. 593, 595 (1960) (grievance challenging discharge of "[a] group of employees"); *Goodall-Sanford, Inc. v. United Textile Workers of Am., A.F.L. Local 1802*, 353 U.S. 550 (1957) (grievance challenging denial of benefits to approximately 1,400 laid-off workers). By requiring workers to pursue arbitration individually *or not at all*, the employers are *not* bringing arbitration back to its roots; they are imposing an artificial, entirely one-sided restraint on relatively powerless employ-

ees in direct contravention of eight decades of established national labor policy.

B. Congress in 1932 and 1935 Had No Reason or Obligation to Make Express Reference to the FAA or Arbitration When Guaranteeing Employees the Right to Engage in Concerted Activity for Mutual Aid or Protection

The Employers ultimately rest their position on the assertion that under cases such as *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and *CompuCredit*, 565 U.S. at 98, *no* provision in an arbitration contract may be invalidated unless a "clear congressional command" requires such invalidation. *See, e.g.*, E&Y Br. 20-25, 32, 37; Epic Br. 13-18. The Board and the Party-Employees have responded at length to this argument, demonstrating that *Mitsubishi*, *Gilmer*, and *CompuCredit* involved a different issue (whether Congress intended to preclude waiver of a judicial forum for a particular statutory claim), and that the inquiry into congressional "command" is best understood as the typical inquiry into congressional "intent." We offer just two additional points.

First, prior to *Mitsubishi* in 1987, this Court had never suggested that Congress had to express itself with special clarity when it intended to preserve a claimant's right to pursue particular statutory claims in court rather than in mandatory arbitration. Until *CompuCredit* in 2012, moreover, this Court had never required Congress to express that intent other than

through the statutory language, its underlying purposes, or some inconsistency between arbitration and the newly created rights. *See Gilmer*, 500 U.S. at 27-29. Thus, no "clear congressional command" requirement as the Employers construe it existed before 2012; and certainly no heightened showing of congressional intent was required in 1932 and 1935 when Congress enacted Norris-LaGuardia and the NLRA. So, even if the present cases raised the same type of issue as in *CompuCredit*—whether a particular statutory claim was non-arbitrable—any heightened standard that Congress must now satisfy in enacting new legislation was not the standard in the 1930s when Norris-LaGuardia and the NLRA were enacted. Besides, as the examples described *supra* at 5 demonstrate, if the FAA required enforcement of every unlawful term in an arbitration contract except those that violate statutes that expressly refer to the "FAA" or "arbitration," employers could deprive workers of substantive statutory rights protected by Title VII, the ADEA, the ADA, and almost every other worker-protection statute enacted by Congress and the states simply by inserting the otherwise unlawful provision into an arbitration contract.

Second, this Court should not base its analysis on whether Congress in Norris-LaGuardia or the NLRA made "clear" reference to the FAA or to employment arbitration because there would have been no logical reason for Congress to do so, given the historical context. At the time of enactment, the FAA did not apply to contracts of employment of any category of workers whom Congress had Commerce Clause power to regulate. *Circuit City*, 532 U.S. at 138-40 (Souter, J., dissenting); *see Hammer v. Dagenhart*,

247 U.S. 251, 272 (1918). Not until well after the FAA was enacted did this Court construe the Commerce Clause as empowering Congress to regulate employees in industries other than those Congress had expressly excluded from FAA—the state- and foreign-line-crossing "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. §1.

It therefore would have made no sense for Congress in 1932 or 1935 to have included language in Norris-LaGuardia or the NLRA expressly referring to the FAA or to employment arbitration. At the time, there was no reason to believe the FAA even applied to employment contracts; and as shown *supra* at 28-30, labor arbitration affecting large numbers of workers in a single proceeding was commonplace and no one disputed its appropriateness. Even if there were some basis for uncertainty, though, Congress put it to rest through Section 15 of Norris-LaGuardia, which plainly stated that Norris-LaGuardia should take precedence over any portion of any prior act. *See* 29 U.S.C. §115.

CONCLUSION

The right to engage in concerted protected activity is "a bedrock principle of federal labor law and policy" that has repeatedly been invoked by the Board and the courts over the past eight decades. *Bristol Farms*, 2015 WL 7568339, at *3 (Nov. 25, 2015). Just as an employer cannot deprive its workers of that substantive statutory right by insisting that they agree to arbitrate all workplace disputes instead of picketing, bargaining, striking, or engaging in any other

form of legally protected collective protest activity, neither can it opt out of the core, substantive worker-protective right established by Norris-LaGuardia and the NLRA by requiring its workers prospectively to waive their statutory right to improve workplace conditions through collective adjudication.

For the reasons stated, the decision of the Fifth Circuit should be reversed and the decisions of the Seventh and Ninth Circuits should be affirmed.

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